

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY GREEN,

Defendant-Appellant.

UNPUBLISHED

August 12, 2003

No. 239989

Wayne Circuit Court

LC No. 01-004167

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree, premeditated murder, MCL 750.316, nine counts of assault with intent to commit murder, MCL 750.83, and one count of commission of a felony while in possession of a firearm, MCL 750.227b. He was sentenced to life imprisonment for first-degree murder, fifteen to sixty years' imprisonment for each count of assault with intent to murder and two years' imprisonment for felony-firearm. Defendant now appeals as of right and we affirm.

On March 7, 2001, a house in Detroit was riddled with bullets from one or more shooters outside the home. There were ten people in the house, including five children. One child, a four-year-old girl, was struck in the head by a bullet and killed. The bullet that killed the little girl came from an AK-47. No one saw defendant commit the shooting. However, the prosecution produced a witness, Robert Borns, who was with defendant and another man¹ earlier in the evening before the shooting took place although he was not present when the shooting occurred. Borns testified that the men were both drunk and armed, defendant with an AK-47 and Barnes with a nine-millimeter semi-automatic pistol. The men were angry and threatening to "shoot" up a house nearby, the house that later was the target of the hail of bullets described by its occupants at trial. Borns also testified that on the day after the shooting he talked to his brother, Barnes, who admitted that he (Barnes) and defendant committed the shooting.

¹ The second man was the witness' brother, Timothy Barnes, who was also charged in the shooting. Barnes fled and was still at large at the time of defendant's trial.

On appeal, defendant first argues that the trial court erred in refusing his request to give the cautionary jury instructions on accomplice testimony.² CJI2d 5.5, 5.6. We disagree. Even if we concede that Borns was arguably an accomplice because he supplied the nine-millimeter pistol to his brother³, there is no error requiring reversal in the failure to give the instructions as requested.

To preserve an instructional issue for appeal, a party must request the instruction before instructions are given *and* must object on the record before the jury retires to deliberate. MCR 2.516(C), *Hunt v Deming*, 375 Mich 581, 584-585; 134 NW2d 662 (1965); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). The objection must specifically state the objectionable matter and ground for the objection. MCR 516(C), *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NW2d 215 (1995). Where a party expressly adopts the trial court's instructions, an appeal is waived. *Chastain v General Motors Corp*, 254 Mich App 576, 591; 657 NW2d 804 (2002).

In this case, defendant requested the accomplice instructions before the court instructed the jury. The court considered the argument that Borns was an accomplice and rejected it. After instructing the jury, the trial court asked counsel, "Anything? Was anything omitted? There was nothing else instructed or requested. Anything omitted?" Defense counsel answered, "No". After a brief discussion about some other instructions, the court again addressed counsel, "Anything else from anybody?" Defense counsel made no response. The issue is waived.

Under MCL 769.26 a conviction may not be set aside because of erroneous jury instructions unless the error resulted in a miscarriage of justice. Our review of the record convinces us that there was no error in refusing to give the accomplice instructions because the testimony did not support the conclusion that Borns was an accomplice to the crime. Borns testified that when Barnes first called demanding that Borns deliver the nine millimeter gun, Barnes told Borns that it was because there had been an argument with the owner of a neighborhood store. It was only after Borns delivered the gun that he learned about the plan to "shoot up" the house where the little girl was later killed. Borns also testified that he tried to convince defendant and Barnes to abandon their plan and that he left before they did anything in furtherance of their plan. Borns was not an accomplice to the crimes and no miscarriage of justice occurred in the refusal to instruct on that request⁴. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

² Robert Borns testified that his brother, Timothy Barnes, had a gun (a nine millimeter pistol) stored at Borns house. On the night of the shooting, Barnes called Borns and demanded that Borns deliver the gun to him, which Borns did. The second gun, the AK-47, also belonged to Barnes, but it was in defendant's possession when Borns saw the two men before the shooting. Borns testified that he tried to talk the men out of carrying out their plan, to no avail.

³ The trial court expressly rejected defendant's argument that Borns was an accomplice in denying the request for the accomplice instructions.

⁴ It should also be noted that defense counsel thoroughly cross examined Borns and called his credibility into question in argument as well. The jury knew that Borns was granted immunity from prosecution for any crime he might have committed (specifically carrying a concealed
(continued...)

Defendant next argues that the prosecutor committed misconduct in commenting on defendant's failure to testify and in evoking sympathy for the young victim. We disagree. Claims of prosecutorial misconduct are reviewed case by case. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). Our review is de novo to determine if defendant was denied a fair and impartial trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). After reviewing the record, we conclude that defendant was not denied a fair and impartial trial.

Defendant argues that the prosecutor improperly commented on defendant's failure to testify during closing argument and rebuttal. In both instances, defense counsel objected and the trial court responded appropriately, sustaining the objections. The court also instructed the jury that counsel's arguments are not evidence.

Defendant also claims that prosecutorial misconduct occurred when a photograph of the victim was left on a monitor for the jury to view. Again, defense counsel's objection was sustained, the court found that there was no intent to leave the photo on the monitor and the incident was relatively brief. We find no error and no prejudice.

Defendant also objected during the prosecutor's closing, arguing that there was an improper attempt to evoke sympathy. After a bench conference, the prosecutor clarified the argument briefly and moved on. We find no error. The prosecutor was commenting on the effect of the shooting on the other children who were in the house, but not injured. There was no error.

Defendant's final argument relates to testimony of Robert Borns concerning conversations he had with Timothy Barnes before the shooting and on the day after the shooting. Over defense objection, Borns was permitted to testify that when he delivered the nine millimeter pistol, Barnes threatened to "shoot up " and "burn" the house down the street, that defendant was with Barnes and that both were armed, angry and drunk. The next day, when he asked Barnes if he (Borns) shot up the house, Barnes admitted that he and defendant did the shooting. Defendant argues that the testimony was inadmissible hearsay as to him. We disagree.

The admissibility of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The statements made before the shooting were within an exception to the hearsay rule and admissible under MRE 803(3) as evidence of existing state of mind and emotional condition. *People v Brownridge (On Remand)*, 237 Mich App 210, 216-217; 602 NW2d 584 (1999). There was no abuse of discretion in allowing Borns to testify to statements made by Barnes in defendant's presence before the shooting.

(...continued)

weapon while delivering the pistol to Barnes), and the trial court instructed that the jury was to consider Borns' credibility in light of how the immunity might affect his bias or self-interest.

The statement Barnes made to Borns the day after the shooting implicating himself and defendant was also properly admitted. The statement was clearly against Barnes' penal interest under MRE 804(b)(3) and met the test of *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). As such, it fell within an exception to the hearsay rule as to Barnes. However, the question is whether the statement was properly admitted against *defendant*. Where a statement is admissible under MRE 804(b)(3) it may be admissible against a co-defendant if its admission does not violate the defendant's right to confrontation. *People v Poole*, 444 Mich 151, 159-166; 506 NW2d 505 (1993). Here the statement bears sufficient indicia of reliability under the totality of the circumstances to be properly admitted against defendant. The statement was made with a few hours of the shooting to a relative, Barnes' brother, Borns. It was made during a telephone call so there is no suggestion of coercion or anything like an in-custody police interrogation. The admission of guilt did not shift all the blame to defendant and nothing in the record suggests that Barnes had any reason to lie or distort the truth either as to his own guilt or that of defendant. We find no abuse of discretion in the admission of the statement. See *People v Beasley*, 239 Mich App 548; 609 NW2d 581 (2000); *People v Schutte*, 240 Mich App 713; 613 NW2d 370 (2000).

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly